KD RESOURCES SDN BHD

v.

NG BOON JIEH & SON REALTY SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S2-22-502-1996]
19 NOVEMBER 2002

CIVIL PROCEDURE: *Costs - Security for costs - Principles applicable - Whether security for costs should be ordered against plaintiff company - Whether plaintiff's claim would be stifled - Whether plaintiff proved ability to pay costs of action - Whether plaintiff showed it could raise sufficient funds - Companies Act 1965, s. 351(1)*

COMPANY LAW: *Suit by company - Security for costs - Principles applicable - Whether plaintiff's claim would be stifled - Whether plaintiff proved ability to pay costs of action - Whether plaintiff showed it could raise sufficient funds - Companies Act 1965, s. 351(1)*

This was an appeal by the defendants' against the decision of the deputy registrar dismissing their applications under s. 351(1) of the Companies Act 1965 ('CA65') for security for costs against the plaintiff. The defendants contended that they had a strong and meritorious defence with good prospects of success, and that they would unlikely be able to recover their costs from the plaintiff (which had since been wound up) in the event their defence succeeded.

Held:

[1] The plaintiff had failed to satisfy the court that an order for security for costs should not be granted. It could not show that such an order would stifle its claim against the defendants'. The plaintiff had also failed to prove its ability to pay the costs of the action in the event that it failed in its claim. The plaintiff had also failed to show, by way of affidavit evidence, that it had made every effort to raise funds from either its directors, shareholders or other interested parties in order to meet the costs that could be incurred. (pp 337 e-h, 338 a-h, 339 a-h, 340 a-d, 343 d-f & 344 d-e)

[Defendants' appeal allowed; security for costs ordered.]

Case(s) referred to:

Buckley v. Bennell Design and Constructions Pty Ltd [1974] 1 ACLR 301 ***(refd)***

Concorde v. Anthony Motors (Hutt) Ltd (No 2) [1977] 1 NZLR 516 ***(refd)***

Donna Bersaudara Sdn Bhd v. Cape Contracts International Ltd & Anor [1993] 2 CLJ 577 ***(refd)***

Drumdurno Pty Ltd v. Braham [1982] 7 ACLR 131 ***(refd)***

Gula Perak Bhd v. Agri-Projects (M) Sdn Bhd [1989] 1 MLJ 422 ***(refd)***

Keary Developments Ltd v. Tarmac Construction Ltd & Anor [1995] 3 All ER 534 ***(foll)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Northampton Coal, Iron & Waggon Co v. Midland Waggon Co [1878] 7 Ch D 500 ***(refd)***

Sembawang Engineering Pte Ltd v. Priser Asia Engineering Pte Ltd [1992] 2 SLR 806 ***(refd)***

Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 1 QB 609 ***(refd)***

Quality Tractors (M) Sdn Bhd v. United Asian Bank Bhd [1980] 1 MLJ 95 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 351(1)

Companies Act [Brunei], s. 320

Companies Act 1985 [UK], s. 726

For the plaintiff - Thayakugan Rajendram; M/s Rajadevan & Assocs

For the 1st defendant - Yap Lai Lian; M/s KB Chua & Co

For the 2nd defendant - Maurice Ernest Scully (Yushana Mohd Ali); M/s Scully Yoon

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of a summons in chambers in encl. 42 which was dated 18 November 1999, the first defendant applied pursuant to s. 351(1) of the Companies Act 1965 for an order that the plaintiff provides security for costs in the sum of RM50,000. The learned deputy registrar heard encl. 42 and she dismissed it with costs on 12 January 2001. Being aggrieved, the first defendant filed an appeal to the judge in chambers as seen in encl. 56.

Likewise, the second defendant had applied by way of a summons in chambers in encl. 46 which was dated 11 March 2000 for security for costs under s. 351(1) of the Companies Act 1965 against the plaintiff in the sum of RM60,000. Having heard encl. 46 on 12 January 2001, the

learned deputy registrar dismissed it with costs. Unhappy at this outcome, the second defendant filed an appeal to the judge in chambers as seen in encl. 57.

This judgment focussed itself on encls. 56 and 57.

Facts Of The Case

The plaintiff sought, *inter alia*, specific performance of an alleged oral arrangement for the sale and purchase of two pieces of lands together with the premises erected on the said lands which were held under Grant No: 5472, Lot 531, Seksyen 47, Bandar Kuala Lumpur and Grant No: 5473, Lot 532, Seksyen 47, Bandar Kuala Lumpur. Both these two pieces of lands would, hereinafter, be collectively referred to as "the said property".

Approximately two years and three months after the plaintiff had commenced its action – the action was commenced on 23 June 1999 – the plaintiff then proceeded to amend and did amend its statement of claim to include another alleged oral counter offer which was made by the plaintiff and purportedly agreed to by both the first and the second defendants.

It would thus appear that the plaintiff's claims hinged on the alleged oral sale and purchase agreement of the said property with the first defendant and the alleged oral counter offer by the plaintiff which was purportedly agreed to by both the first and the second defendants. But both the defendants strenuously denied these unfounded allegations.

It was contended on behalf of the first defendant that the oral agreement to enter into a sale and purchase agreement of the said property was lawfully terminated by the first defendant due to the plaintiff's failure to execute a sale and purchase agreement for the purchase of the said property within the time stipulated as envisaged in the letter marked as exh. "NBJ1" dated 7 September 1993 and in the letter marked as exh. "NBJ2" dated 20 September 1993 as seen in encl. 41 at paras. 3 and 4 thereto.

It was the stand of the first defendant that approximately eight months after the lawful termination by the first defendant, the latter then entered into two sale and purchase agreements for the said property with the second defendant and this was on 3 May 1994. Events showed that the said property had been lawfully, validly and completely transferred and duly registered in the name of the second defendant on 14 September 1994.

Both the defendants held similar views and they contended that the plaintiff's action was not genuine. They say that the plaintiff sought specific performance of the alleged oral agreement to buy the said property, yet the plaintiff had been wound up on 31 October 1996. Both the defendants averred that the plaintiff was unlikely to be able to settle the outstanding balance of the sale and purchase price of the said property which was to the tune of RM1.8 million.

The first defendant disputed the plaintiff's claim as seen in its amended statement of defence. It was averred by the first defendant that the plaintiff had failed, refused and neglected to comply with the order and the judgment of the magistrate's court dated 29 September 1994 as reflected in exh. "NBJ3" of encl. 41 at p. 34 to p. 35 and in exhibit marked "A" of "NBJ5" of encl. 41 at p. 47 to p. 48. By virtue of that court order dated 29 September 1994, the plaintiff was required to pay the judgment sum of the accrued rentals of premises at No: 2, Jalan Setiawan, Off Jalan Razak 50400 Kuala Lumpur together with interest and costs thereto to the first defendant. Unfortunately, the plaintiff failed to comply with the magistrate's court order dated 29 September 1994 and this prompted the first defendant to commence a winding-up proceeding against the plaintiff. The plaintiff was subsequently wound up pursuant to the winding up order on 31 October 1996. It must be put on record that the plaintiff's appeal against the order and the judgment of the magistrate's court dated 29 September 1994 was in due course dismissed by the High Court and the plaintiff did not file any appeal to the Court of Appeal.

Both the defendants held the views that they had a strong and meritorious defence with good prospects for success. Both the defendants were concerned that in the event the plaintiff failed in its action herein, they would unlikely be able to recover any costs from the plaintiff. That the plaintiff had since been wound up further aggravated the concerns of both the defendants.

The stand of the first defendant was that it had incurred costs in defending the action. The first defendant had shown by way of the bill of costs as seen in exh. "NBJ11" of encl. 47 at p. 25 to p. 30 that the estimated costs for defending the action would be to the tune of RM50,000. This averment was not challenged by the plaintiff at all and it ought to be treated as an admission of the fact so asserted (*Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 CA). While the second defendant at para. 5 of encl. 45 quoted a figure of RM60,000 as the reasonable sum that should be paid into court as security for costs. The second defendant too averred that it would continue to incur costs in defending the action.

Both the defendants held similar views to the effect that the plaintiff ought to provide security for costs in order to ensure that in the event the plaintiff failed in its action, both the defendants would be able to recover the costs incurred in defending the action herein. For these reasons, both the defendants argued that their appeals should be allowed with costs. Both the defendants feared that their appeals might be dismissed and if that were to happen both the defendants would not be able to recover the costs incurred in defending the plaintiff's claim notwithstanding the fact that the plaintiff might fail in its action at the trial proper. If this were to happen, injustice would be caused to both the defendants.

The Law And Its Ramifications To The Facts Of The Case

It must be recalled that both the defendants applied for security for costs pursuant to s. 351(1) of the Companies Act 1965 which enacts as follows:

> **Security for costs**
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> 351. (1) Where a company is plaintiff in any action or other legal proceeding the Court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

According to Jessel MR in *Northampton Coal, Iron & Waggon Co v. Midland Waggon Co* [1878] 7 Ch D 500, 503, the fact that the company was in liquidation would be sufficient reason to believe that the assets of the company would be insufficient to pay for the costs of the proceedings. At any rate, the inability of the company to pay may be proven in any way so long as it is done by way of a credible testimony. According to the case of *Concorde v. Anthony Motors (Hutt) Ltd (No. 2)* [1977] 1 NZLR 516, the onus of showing that the plaintiff was likely to be unable to pay the defendant's costs rested entirely upon the defendant. It would, however, be germane to state the law in this fashion. That an order for security for costs under s. 351(1) of the Companies Act 1965 is not to be considered as mandatory even though it is shown that the plaintiff is likely to be unable to pay the defendant's costs. Everything would be at the discretion of the court whether security for costs would be ordered or not. For this simple proposition of the law, reference to the following cases would certainly be useful:

(1) *Quality Tractors (M) Sdn Bhd v. United Asian Bank Bhd* [1980] 1 MLJ 95;

(2) *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 1 QB 609; and

(3) *Sembawang Engineering Pte Ltd v. Priser Asia Engineering Pte Ltd* [1992] 2 SLR 806, 811.

It would not be out of place to refer to the speech of Street CJ in *Buckley v. Bennell Design and Constructions Pty Limited* [1974] 1 ACLR 301, 304, and there his Lordship aptly said:

> … the courts have been concerned to achieve a balance between ensuring that adequate and fair protection is provided to the other party, and avoiding injustice to impecunious companies by unnecessarily shutting them out or prejudicing them in the conduct of litigation.

and using this passage as a guideline this court would exercise its discretion whether to allow both the defendants' appeal thereby allowing their applications for security for costs. The discretion was certainly placed on my shoulders to decide the matter forthwith – one way or the other. I would gratefully adopt the factors that were set out in *Drumdurno Pty Ltd v. Braham* [1982] 7 ACLR 131 in order to arrive at a decision as to whether I should exercise the discretion of ordering the plaintiff to provide security for costs for the first defendant in the sum of RM50,000 and for the second defendant in the sum of RM60,000. These factors may be summarised in these ways:

(1) whether the plaintiff had a good prospect of success in its claim;

(2) whether the plaintiff's impecuniosity was occasioned by the defendant;

(3) whether the plaintiff's claim was *bona fide* and not a sham;

(4) whether there was evidence to show that the defendant was utilising the application for security for costs oppressively in order to stifle a genuine claim by the plaintiff's company;

(5) whether in ordering the plaintiff to pay and provide security for costs would undermine the plaintiff's chances of proceeding with its action; and

(6) whether, in the public interest, the application for security for costs ought to be refused so that matters of public importance may be litigated.

These are certainly factors that would be considered by me. But there are also other more compelling factors as stated by Peter Gibson LJ in *Keary Developments Ltd v. Tarmac Construction Ltd and Another* [1995] 3 All ER 534, 539, 540:

The relevant principles are, in my judgment, the following.

1. As was established by this court in *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 2 All ER 273, [1973] QB 609, the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security (see *Okotcha v. Voest Alpine Intertrading GmbH* [1993] BCL 474 at 479 per Bingham LJ, with whom Steyn LJ agreed). By making the exercise of discretion under s. 726(1) conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security (see *Pearson v. Naydler* [1977] 3 All ER 531 at 536-537, [1977] 1 WLR 899 at 906 per Megarry V-C).

3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see *Farrer v. Lacy, Hartland & Co* [1885] 28 Ch D 482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see *Pearson v. Naydler* [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906).

4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (see *Porzelack KG v. Porzelack (UK) Ltd* [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C). In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim.

5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see *Roburn Construction Ltd v. William Irwin (South) & Co Ltd* [1991] BCC 726).

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence (see *Trident International Freight Services Ltd v. Manchester Ship Canal Co* [1990] BCLC 263). In the Trident case there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal.

Continuing at the same page and spilling over to p. 541 of the report, Peter Gibson LJ had this to say:

However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation (see *Flender Werft AG v. Aegean Maritime Ltd* [1990] 2 Lloyd's Rep 27). In that case Saville J applied by way of analogy the approach adopted in another context, that of payment into court as a condition of leave to defend. In *M V Yorke Motors (a firm) v. Edwards* [1982] 1 All ER 1024 at 1028, [1982] 1 WLR 444 at 449, 450 Lord Diplock approved the remarks of Brandon LJ in the Court of Appeal:

> The fact that the man has co capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him, in his hour of need.

In *Kloechkner & Co AG v. Gatoil Overseas Inc* [1990] CA Transcript 250 Bingham LJ cited with approval certain remarks of the Registrar of Civil Appeals. Mr Registrar Adams was willing to assume that the situation before him was the same as that exemplified in the Farrer case, that is to say that there was a probability that the defendant wrongly caused the plaintiff's impecuniosity on the basis of which security for costs was being sought. The registrar said:

> In my judgment, the approach to be adopted in cases where, as here, there are good arguable grounds of appeal and it is within the Farrer principle but the appellant contends that the award of security will stifle the appeal, should be the same as the approach adopted in *MV Yorke Motors (a firm) v. Edwards* Ord 14 cases, where conditional leave to defend is being contemplated. The approach, in my view, should be that the onus is on the appellant to satisfy the Court of Appeal that the award of security for costs would prevent the appeal from being pursued, and that it is not sufficient for an appellant to show that he does not have the assets in his own personal resources. As in the *Yorke Motors* case, the appellant must, in my view, show not only that he does not have the money himself, but that he is unable to raise the money from anywhere else.

His Lordship Peter Gibson LJ then continued and this was what he said at p. 543 to p. 544 of the report:

> There was no evidence of their means, apart from the fact that they were the owners of a house which was being let to the plaintiff at an annual rate of 36,000 pounds pa, that house being mortgaged to a bank for 200,000 pounds. There were no accounts of the plaintiff later than the accounts for the period ended 31 May 1991, the directors of the plaintiff being in flagrant breach of their statutory duties in this regard. There is no evidence of who is financing the current litigation, nor how it is being financed. From the figures of the defendants' costs that I have already given, this litigation is extremely expensive. The only evidence that is put in was that to which I have already drawn attention, that an order for security 'may' stifle the claim. In my judgment, this is plainly insufficient and inadequate evidence on which to reach the conclusion that substantial order for security would stifle the claim. As the plaintiff failed to discharge the onus on it of putting in evidence to satisfy the court on this point, the Official Referee was wrong to take it into account.
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> (4) It appears that the Official Referee considered only whether a substantial order for security would stifle the claim. He did not consider whether a lesser sum than a substantial sum would stifle the claim, or could otherwise be ordered by way of security without preventing this litigation going ahead.
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> (5) The Official Referee misdirected himself, in my view, in taking into account as a factor against the defendants the fact that the application was late, when that was caused by the plaintiff, and in treating it as a material consideration in not ordering security. It was proper for him to look at the lateness of the application, and to take note of the substantial costs that had already been incurred on both sides. But he should have paid attention to the fact that an even larger sum by way of costs was yet to be incurred. He should have exercised his discretion in relation to an order for security

bearing that in mind, as well as the fact that he held the defendants to be blameless. As he says, they had had the lateness forced upon them by the course the action had taken.

As I am satisfied, therefore, that the Official Referee did err in law, it follows that this court has to exercise its own discretion. Having regard to all the circumstances, including the way the litigation has proceeded, the payment in, the changes in stance adopted by both sides, the lateness of the application (including the fact that substantial costs have been incurred by the plaintiff before an order for security has been made) in consequence on the reamendment to the statement of claim and the estimate of future costs, and having regard to the defendants' request that security be ordered in the sum of 200,000 pounds, for my part I would make an order for security but in a sum considerably reduced from that requested. It seems to me that the appropriate sum would be 100,000 pounds.

I would allow the appeal and direct that the proceedings be stayed until such sum is provided by way of security by the plaintiff.

Street CJ in *Buckley v. Bennell Design and Constructions Pty. Limited (supra)* at p. 304 of the report aptly said:

In *Pacific Acceptance Corporation Ltd. v. Forsyth (No. 2)* [1967] 2 NSWR 402, 407; 85 WN (Pt. 1) (NSW), 715, 721 Moffitt J (as the President then was) said: 'It was also put that the court ought not make an order, which, because of the impoverishment of the company might frustrate its rights to litigate its claim. However, the very basis of the exercise of jurisdiction to order security for costs against a company as distinct from an individual is that the company is impoverished. It recognizes that if a company wins it will get the benefit of its verdict and an order for costs against the defendant to the advantage of those who have an interest in the assets of the company; but that the defendant sued will, if successful, be at a disadvantage in being unable to recover his costs if the company is financially insecure, and that it is fair that he be placed in an equal position with the company by the company providing or having provided by those concerned in the fruits of the litigation a means of the defendant sued recovering his costs, if he wins.

Street CJ continued in serious vein and his Lordship had this to say at p. 305 of the report:

There is clearly enough a ground for treating the discretion as unlimited in that the section itself does not in its terms specify the approach to be adopted in exercising the discretion. On the other hand, over its many years of history, this section has been construed by the courts in a manner indicating some predisposition in favour of granting a defendant who is sued by an impecunious company the protection of an order for security.

> I hesitate to embrace without qualification either of the conflicting views expressed in *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* The provision is of long standing and some gloss has been put upon it. This has, perhaps, led to an undue readiness in some cases to regard an order for security as a matter of right in the absence of special circumstances. No doubt Lord Denning and Lawton, LJ, were concerned to correct this restraint on the width of the discretion. But their correction, in the face of the long established approach, goes too far. It seems to me that the discretion could properly be regarded as ordinarily exercisable so as to protect a defendant sued by an impecunious company, but that, if the court in any case takes the view that this protection should not be afforded to the defendant, it has an unlimited and unrestricted discretion to give effect to such view without having to look for special circumstances. I prefer to regard the discretion conferred by the section as being one which should be exercised merely with a predisposition in favour of the defendant party.

All these authorities are certainly thought provoking and they serve as useful guidelines in adjudicating encls. 56 and 57. In my judgment, on the available affidavit evidence, the plaintiff had failed to satisfy me in regard to the following matters:

(1) there was no evidence of the plaintiff's means particularly in regard to its assets so as to assist the court to determine whether the plaintiff would be able to pay the costs in the event the plaintiff failed in its action;

(2) there was no affidavit evidence to show that the plaintiff could raise any capital from its directors, shareholders or any other interested persons to help the plaintiff in its "hour of need"; and

(3) there was no affidavit evidence to show as to how the plaintiff could pay the costs that may be incurred.

It was therefore not surprising that both the defendants argued through their learned counsel that their applications for security for costs were filed due to their fear that they would be unable to recover the costs incurred in defending the action in the event the plaintiff failed in its action.

In *Donna Bersaudara Sdn Bhd v. Cape Contracts International Ltd. & Anor* [1993] 2 CLJ 577, the Brunei High Court had to consider an application for security for costs under s. 320 of the Brunei Companies Act (which is similar to our s. 351(1) of the Companies Act 1965 and s. 726 of the United Kingdom Companies Act 1985). In *Donna*'s case, the plaintiff was an inactive limited company. It was in fact a dormant company and the available evidence showed that the plaintiff there was unable to meet its

debts. Sir Denys Roberts CJ ordered that the plaintiff there gave security for costs in the sum of BD 15,000.00 by way of a cash deposit in court or by way of a banker's guarantee for that amount. Here, factually speaking, the plaintiff was not only dormant but it had also been wound up.

In *Gula Perak Bhd v. Agri-Projects (M) Sdn Bhd* [1989] 1 MLJ 422, VC George J (as he then was) had to consider an application by the respondent for security for costs under s. 351(1) of the Companies Act 1965. His Lordship held that the burden was on the petitioner to satisfy the court as to why security for costs should not be ordered. And his Lordship ruled that the petitioner had failed to discharge that burden and ordered the petitioner to "provide suitable security for payment of costs up to an amount of $150,000.00 only". His Lordship also ordered that the petitioner be given "60 days to provide the security".

I preferred the decision of Peter Gibson LJ in *Keary Developments Ltd v. Tarmac Construction Ltd and another (supra)* and applying that decision it was part and parcel of my judgment that the plaintiff had failed to satisfy me that an order for security for costs should not be granted or that, if granted, it would stifle the plaintiff's claim. On top of that, the plaintiff had failed to prove its ability to pay the costs of the action in the event the plaintiff were to fail in its claim. The plaintiff too failed to show, by affidavit evidence, that it had made every effort to raise funds from its directors, shareholders or other interested parties in order to meet the costs that may be incurred. The evidence weighed heavily in favour of both the defendants.

For the following reasons adumbrated above, I allowed the appeal in encl. 56 with costs. I too allowed the appeal in encl. 57 with costs.